



March 29, 2000

Ms. Lynn Rossi Scott
Bracewell & Patterson, L.L.P.
500 N. Akard Street, Suite 4000
Dallas, Texas 75201-3387

OR2000-1215

Dear Ms. Scott:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code (the "Act"). Your request was assigned ID# 133496.

The Grand Prairie Independent School District (the "district"), which you represent, received a request for "Friday reports between the board and the superintendent since May 1999" and "the most recent totals for attorneys' fees" in five specified cases. You indicate that the requested information relating to attorneys' fees will be released. You claim that portions of the responsive Friday reports are excepted from public disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, 552.114, and 552.131 of the Government Code, and under section 552.026 of the Government Code in conjunction with the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"). We have considered the exceptions you claim and have reviewed the information you submitted.

You raise sections 552.101 and 552.102 of the Government Code in conjunction with the common law right to privacy. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information must be withheld under section 552.101 in conjunction with common law privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The matters considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include sexual assault, pregnancy,

mental or physical abuse in the workplace, illegitimacy, psychiatric treatment, attempted suicide, and injuries to reproductive organs. *See* 540 S.W.2d at 683. Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). The protection that section 552.102(a) affords to personnel records corresponds to that which section 552.101 provides to information made confidential under common law privacy and the test in *Industrial Foundation*. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App. – Austin 1983, writ ref’d n.r.e.). Employee privacy under section 552.102 is narrower than common law privacy under section 552.101, however, because of the greater public interest in the disclosure of information relating to public employees. *See, e.g.*, Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Generally, section 552.102 protects employee information from disclosure only when the information in question reveals “intimate details of a highly personal nature.” *See* Open Records Decision No. 423 at 2 (1984). We do not believe that the submitted reports contain any information that is protected from disclosure under section 552.101 or section 552.102 in conjunction with common law privacy.

You also contend that portions of the submitted reports are excepted from disclosure under section 552.103 of the Government Code. As amended by the Seventy-sixth Legislature, section 552.103, the “litigation exception,” provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). To sustain a claim under section 552.103, a governmental body must establish: (1) that litigation is either pending or reasonably anticipated, and (2) that the information in question relates to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481-83 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App. – Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 at 4 (1990). Both elements of the test must be satisfied in order for information to be excepted from disclosure. *Id.* The

governmental body must explain how the information that it seeks to withhold relates to the subject matter of the litigation. *See* Open Records Decision Nos. 638 at 4 (1996), 551 at 5 (1990). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* We note that much of the information that you seek to withhold appears to pertain to proceedings that have been concluded or to matters that have been disclosed to the opposing party or to the public at large. Such information is not protected by section 552.103. *See* Open Records Decision Nos. 638 at 3 (1996), 551 at 4 (1990); *see also* *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Furthermore, you have not demonstrated that the submitted reports contain any information related to anticipated or pending litigation that is protected from disclosure under section 552.103. *See* Open Records Decision No. 638 at 2 (1996) (stating that the purpose of section 552.103 is to protect the litigation interests of the governmental body claiming the exception). Therefore, the district may not withhold any of the submitted information under section 552.103.

You also seek to withhold portions of the submitted reports under section 552.107 of the Government Code. Section 552.107 provides in relevant part that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov’t Code § 552.107(1).¹ Although the scope of section 552.107(1) would appear to be coextensive with that of rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which prohibits an attorney from divulging “confidential information,” this office has concluded that such an interpretation of rule 1.05 would be in potential conflict with the purposes of the Public Information Act. *See* Open Records Decision No. 574 at 4-5 (1990) (construing predecessor statute). Accordingly, this office has determined that section 552.107(1) protects only what rule 1.05 describes as “privileged” information, *i.e.*, information that represents confidential communications between attorney and client. *Id.* at 5. “Unprivileged” information, as defined by rule 1.05, is not excepted from disclosure under section 552.107(1). *Id.* Thus, section 552.107(1) excepts from disclosure only factual

¹We also note your references to section 552.101 in addressing the attorney-client privilege. At one time this office did apply section 3(a)(1) of the former Open Records Act, the predecessor statute to section 552.101 of the Government Code, in determining whether information was excepted from disclosure under the attorney-client privilege. More recent decisions make it clear, however, that a claim that information is excepted from disclosure on the basis of attorney-client privilege generally is governed by section 552.107. *See* Open Records Decision Nos. 575 at 2 (1990), 574 at 2 (1990).

information or requests for legal advice communicated by the client to the attorney and legal advice or opinion rendered by the attorney to the client or to an associated attorney in the course of rendering legal services to the client. *Id.* at 7-8. We do not believe that the submitted reports contain any privileged attorney-client communications that are protected from disclosure under section 552.107.

You also contend that portions of the submitted reports are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 protects "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of section 552.111 is to protect advice, opinion, and recommendation used in the decisional process from public disclosure and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App. -- San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *See* Open Records Decision No. 615 at 5 (1993); *see also City of Garland v. The Dallas Morning News*, 43 Tex. Sup. Ct. J. 303 (Jan. 13, 2000) (holding that personnel-related communications not involving policymaking were not excepted from public disclosure under section 552.111). However, a governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5 (1993). But if the factual information is so inextricably intertwined with material involving advice, opinion or recommendation as to make severance of the factual data impractical, that information may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). We have marked information that the district may withhold under section 552.111.

You also claim that the submitted reports contain information that must be withheld pursuant to sections 552.026 and 552.114 of the Government Code and the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and

(2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Section 552.114(a) of the Government Code requires that the district withhold "information in a student record at an educational institution funded wholly or partly by state revenue." Section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). "Education records" are those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978). In accordance with Open Records Decision No. 634 (1995), you redacted student names and other identifying information from the records prior to submitting these documents to this office. Therefore, we need not address your assertions under sections 552.026 and 552.114.

Finally, you claim that the requested reports contain information that is excepted from disclosure under section 552.131 of the Government Code. As added to chapter 552 of the Government Code by the Seventy-sixth Legislature, Section 552.131 provides as follows:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.131.² Because the legislature limited the protection of section 552.131 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). As you have not informed us of any specific law or regulation that is reported to have been violated, the information that you seek to withhold is not excepted from disclosure under section 552.131.

In summary, portions of the submitted reports are protected from disclosure under section 552.111 of the Government Code and under sections 552.026 and 552.114 and FERPA. We have marked the information that the district may withhold under section 552.111. None of the information that the district seeks to withhold under sections 552.101, 552.102, 552.103, 552.107, or 552.131 is excepted from disclosure. That information must be released. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

²As of September 1, 1999, there were four sections of chapter 552 of the Government Code denominated as section 552.131. The quoted section 552.131 was added by the Act of May 30, 1999, 76th Leg., R.S., ch. 1335, § 6, 1999 Tex. Sess. Law Serv. 4543, 4545 (Vernon) (codified at Gov't Code § 552.131).

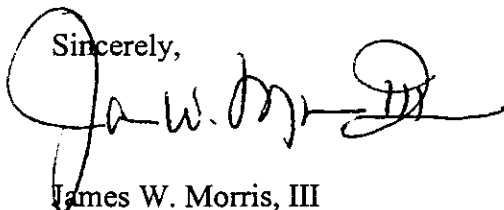
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III", with a large, stylized initial "J" and a flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/nc

Ref: ID# 133496

Encl. Submitted documents

cc: Ms. Tawnell Hobbs
Fort Worth Star-Telegram
P.O. Box 1870
Fort Worth, Texas 76102
(w/o enclosures)